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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1936

No. 505.

The Atchison, Topeka and Santa Fe Railway Company (a corporation),
Petitioner,

vs.

William W. Scarlett,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF FOR PETITIONER.

OPINION BELOW.

The opinion of the Supreme Court of the State of California is reported in 60 Pac. (2d) 462.

Grounds on Which Jurisdiction of This Court Is Invoked.

The judgment of the Supreme Court of the State of California was first entered on January 31, 1936. Then on February 27, 1936, the Court vacated and set aside said

judgment, granted petitioner's petition for a rehearing, and ordered the cause placed on the calendar for argument. On April 7, 1936, the cause was finally submitted. Final judgment was entered on August 7, 1936.

The jurisdiction of this Court is invoked under volume 44, (part 1) of the United States Statutes at Large, title 28, section 344. (Judicial Code, Sec. 237 amended.)

Statutes Involved.

The statutes involved are the Federal Safety Appliance Act of 1910 (36 U. S. Statutes 298, U. S. C. A. title 45, Sections 11 to 16); 27 U. S. Statutes 531, U. S. C. A. title 45, Section 7; 35 U. S. Statutes 66, U. S. C. A. title 45, Section 54.

Statement of the Case.

The respondent, a railroad brakeman in the employ of petitioner, while climbing down the side ladder of a freight car, fell to the ground. The freight car was moving at a speed of about two miles an hour and the movement of the car had nothing to do with the accident. The respondent testified that his fall was caused by his foot coming in contact with an anchor rod or brace rod behind the ladder, which caused his feet to leave the ladder and his hands to jerk from the hand-holds.

This anchor rod is a diagonal brace rod placed at an angle of 45 degrees across the lower corner of the freight car, between the side of the car and the side-ladder. There was a clearance of two and three-quarters inch between the side-ladder and the nearest portion of the anchor rod. The orders and specifications of the Interstate Commerce Commission require a clearance of two inches, preferably two and one-half inches—(Roberts' Federal Liability of Carriers, page 2013). The function of the brace is to strengthen the end of the freight car. The petitioner had 7,000 freight cars identically equipped at the time of the accident.

The respondent based his cause of action wholly upon an alleged defective safety appliance, to-wit, the side-ladder, expressly waiving any cause of action under the Employers' Liability Act, and claimed the presence of the anchor rod, notwithstanding the fact that the side ladder had a "clearance" greater than required by the Interstate Commerce Commission, raised a jury question as to whether the side-ladder was "secure" within the meaning of the statute.

The Supreme Court of the State of California, adopting respondent's theory of the case, sustained the trial court in submitting to the jury the question whether the side-ladder of the freight car was "secure", when the claim of insecurity rested wholly upon the presence of the brace-rod between the side-ladder and the side of the freight car. The jury returned a verdict against petitioner for $18,000.

Specification of Errors to Be Urged.

The errors to be urged are:

A. The Supreme Court of the State of California erred in deciding that a safety appliance defect may be predicated on the single fact that between the side-ladder of a freight car and the side of the car there was a diagonal brace rod, when the clearance between the rungs of the ladder and the brace-rod was two and three-quarters inches, since the orders and specifications of the Interstate Commerce Commission did not require a clearance in excess of two and one-half inches.

B. The Supreme Court of the State of California erred in sustaining the trial court in submitting to the jury the question whether the side-ladder of the freight car was "secure", when the claim of insecurity rested wholly upon the presence of the aforesaid brace-rod.

C. The evidence was insufficient to sustain the verdict of the jury in that it involved an implied finding that the side-ladder did not meet the requirements of the Safety Appliance Act.

SUMMARY OF ARGUMENT.

The respondent abandoned all claim for common-law negligence at the trial and rested his case solely upon an alleged violation of the Safety Appliance Act.

The amendment to the Safety Appliance Act of 1893 which was approved in 1910 was the result of a general demand for safety appliances having uniform standards. In compliance with the amendment of 1910 the Interstate Commerce Commission, on March 11, 1911, promulgated its Safety Appliance Standards order, which has the force of law.

The brace-rod involved is a separate appliance having a distinct function and constitutes no part of the side-ladder. The purpose of the brace-rod is to strengthen the end of the freight car. It is separate and distinct from the safety appliance and is farther away therefrom than is required by the Safety Appliance Standards order of the Interstate Commerce Commission.

There is nothing new in principle about the brace-rod; there is hardly a freight car in the United States or Canada that does not have some brace-rod or obstruction between the side-ladder and the side of the freight car. The function of the different types of these brace-rods is the same, but the mechanism differs on different railroads. These are all designed to conform, however, to the clearance designated in the Commission's Safety Appliance Standards order. The fact that the respondent was injured while using the side-ladder is not significant.

While it is conceded that the Safety Appliance Act should be given a liberal construction, it is obvious that it should not receive an unreasonable construction. The rec-

ord shows no defect in the side-ladder. It was mechanically sound and secure and in strict accordance with the Commission's Safety Appliance Standards order. It is the petitioner's contention that since there was no defect shown to be in the Safety Appliance itself, the mere fact that the respondent was injured because his foot came in contact with a separate appliance, having no connection with the side-ladder, is not sufficient to prove a defective side-ladder.

The petitioner contends that the Safety Appliance is deemed proper when it fully complies with the Safety Appliance Standards order of the Interstate Commerce Commission. The respondent contends that there is no order of the Commission covering the situation. Our answer to that is that the Commission's Safety Appliance Standards order of March 13, 1911, does apply and governs the construction of the side-ladder and, since the side-ladder in question fully complied with this order, the evidence is insufficient to sustain a verdict for the respondent based upon a defective Safety Appliance. The side-ladder with the brace-rod underneath it has been used for years in safety and the accident involved in this case is the only accident that has ever been known to have been caused by the brace-rod.

It is not proper for the courts to lay down rules governing the construction of appliances, nor is it proper for a jury to be permitted to pass upon the adequacy of same. The Safety Appliance Act involved should be construed in accordance with practical railroad operation.

ARGUMENT.

I. Issues.

As stated by the Supreme Court of California "the plaintiff bases his claim to recover on a violation of the provisions of the Safety Appliance Act of 1910 (section 2) to the effect that 'all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards' * * * He relies solely on the presence of the round diagonally placed bar behind the ladder, which, he contends, rendered it insecure in violation of the act. On the trial he expressly waived any rights of recovery he might have based on common-law negligence independently of the above-quoted provision of the Safety Appliance Act." (60 Pac. (2d) 463.) [R. 122, 123.] The reason the respondent abandoned his claim for negligence under the Federal Employers' Liability Act was because petitioner proved through the testimony of many witnesses that the respondent had worked on hundreds of cars just like the car in question and had every opportunity to become thoroughly familiar with those cars and with every detail of their construction. [R. 51 to 53.] The evidence was, therefore, conclusive that if respondent had relied upon a claim of common-law negligence he assumed the risk of the dangers. The only issue involved, therefore, being the question whether the petitioner was maintaining a defective safety appliance, we are confronted with the fact that the Safety Appliance Act "is narrower in its scope and application than is the Federal Employers' Liability Act," *Harlan v. Wabash Ry.*, 335 Mo. 414, 73 S. W. (2d) 749.

II. History.

The annual reports of the Interstate Commerce Commission beginning in 1895 and running through until 1909 contain many expressions of disapproval of the fact that the law did not require uniformity of safety appliances. This need was met on April 14, 1910 when there was approved an act of Congress requiring secure ladders and also requiring that

> "within six months after the passage of the act *the Interstate Commerce Commission, after hearing, shall designate the number, dimensions, location, and manner of application of the appliances provided for by section two of this act and section four of the act of March second, eighteen hundred and ninety-three* (italics ours) and shall give notice of such designation to all common carriers subject to the provisions of this act by such means as the commission may deem proper, *and thereafter said number, location, dimensions, and manner of application as designated by said commission shall remain as the standards of equipment to be used on all cars subject to the provisions of this act, unless changed by an order of said Interstate Commerce Commission,* to be made after full hearing and for good cause shown; and *failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of this act.* * * *" (Italics ours.) (Vol. 36 U. S. Statutes at Large 298.)

Subsequently and on September 29th and 30th, and October 7th, 1910, and on February 27th, 1911, hearings were held before the Interstate Commerce Commission at its offices in Washington, D. C., to consider the matter of the number, dimensions, location and manner of application of the appliances in accordance with the provisions of sec. 3 of the above-named act of Congress; and on March 13th, 1911, the Interstate Commerce Commission made its order designating the number, dimensions, location and manner of application of certain safety appliances, among which was that of ladders on the sides of box and other house cars; that said order, after designating the number and dimensions of said ladders, provided that said ladders should have a minimum clearance of treads of two, preferably two and one-half inches. This order, so far as it relates to the particular safety appliance involved in this case, has never been amended or repealed. (Volume 2, Roberts Federal Liability of Carriers, pages 2010 to 2013.)

This order of the Interstate Commerce Commission, which the Court may take judicial notice of (*Thompson v. Missouri Pacific R. Co.*, 15 Fed. (2d) 28), has the same force and effect as the statute itself.

Interstate Commerce Commission v. Goodrich Transit Co., 224 U. S. 194, 32 Sup. Ct. 436, 56 L. Ed. 729;

United States v. Grimaud, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563;

Kansas City S. R. Co. v. United States, 231 U. S. 423, 34 Sup. Ct. 125, 58 L. Ed. 296, 52 L. R. A. (N. S.) 1.

III. The Brace Rod Is a Separate Appliance Having a Distinct Function, and Constitutes No Part of the Side-Ladder.

Counsel for the respondent in their brief in opposition to our petition for writ of certiorari, made the statement that this diagonal brace rod was "a part of the ladder." (Pages 4 and 5, Brief for Respondent in Opposition to Petition for Writ of Certiorari.) The respondent is bound to take this position because, if the rod is not a part of the ladder, the ladder is not defective. That the rod is no part of the ladder is manifest from plaintiff's Exhibits 2 [R. 520], 3 [R. 521], and 5 [R. 523] and defendant's Exhibits 4 [R. 538], 5 [R. 539] and 6 [R. 540] and from the testimony.

Mr. Fred A. Isaacson, engineer of car construction of the Santa Fe Railway System, a witness, testified as follows:

> "That brace was put on there for the purpose of strengthening that car across the corner and provide means for tightening it and keeping it in shape, which supports the end and keeps it from bulging, thereby encroaching on any clearances that we might have between the two cars and causing an unsafe condition there." [R. pp. 63, 64.]

> "There is an enormous strain on ends of the cars due to the impact that the car gets in moving over the railroad. The coupling and uncoupling, the shift of commodities to get over the end and get jammed, endeavoring to shove the ends out. That is the worst thing that we have got to contend with in car construction, is to get an end of sufficient strength to withstand that impact." [R. pp. 63, 64, 68, 69.]

It is seen, therefore, that the brace-rod has a distinct function, to strengthen the end of the box-car. Having a function of its own and not being a part of the side-ladder, and being farther from the ladder than is required by the rules and specifications of the Interstate Commerce Commission, the brace-rod is distinctly a separate appliance. Whether it interfered in any way with the use of the side-ladder *was material only in considering whether the railway was guilty of common law negligence, which had been eliminated from the issues.*

There was nothing new and novel about this brace-rod. The uncontradicted evidence was that there is scarcely a freight car in the United States or Canada that does not have some projection of some sort underneath the side-ladder. [R. 76.] Looking at Respondent's Exhibits 3a, 3b, 3c, 3d and 3e [R. pp. 533 to 537] we see another type of freight car with diagonal brace-rod between the side-ladder and the side of the freight car. Respondent's Exhibits 5, 7 and 8 [R. pp. 539, 541, 542] show an end ladder with a large brace-rod between the ladder and the end of the freight car. These represent types of freight cars that have been in common use for years. Mr. Isaacson, the witness referred to, testified that the flat brace formerly used by the company was unsatisfactory "due to the buckling; that is, when it buckles it curls up like that (indicating). Sometimes that buckling occurs right underneath the ladder * * * for that reason we broke away from our practice sometime in 1924 and applied to our cars a round inch and one-eighth diagonal brace." [R. pp. 63 and 64.]

Mr. Michael Meehan, master car repairer for the Southern Pacific Company, a witness for the petitioner, testified that he was familiar with flat braces and that he

had observed such flat braces have a tendency to buckle and that when they do so they interfere with the use of the car. [R. pp. 173, 174.].

Obviously it was not intended that Congress or the courts should lay down rules as to all the mechanical contrivances about a freight car. Definite rules were made by the Interstate Commerce Commission as to the construction of ladders, but specific rules as to the construction of appliances, not within the class of safety appliances, were left for the carriers to construct according to mechanical needs. The only relation the diagonal brace rod has to the side-ladder involved is that of clearance. This clearance was designated by the Interstate Commerce Commission and was fully complied with. Pertinent to this inquiry our attention should be directed to the meaning of the word "clearance", as used, interpreted and applied in practical railroad operations. "Clearance", as defined in Webster's International Dictionary is "the distance by which one object clears another, or the clear space between them." The same word is defined by Funk & Wagnalls New Standard Dictionary as "the space by which a moving machine or part clears something", and the word "clear" is defined as "unbroken or unobstructed distance or space, as between two things where nothing intervenes." See *Palomino v. Atchison, Topeka & Santa Fe Railway Co.*, 91 Kansas 556, 138 Pac. 616. That has been the interpretation placed upon the term for years by all railroads. Every railroad has for years used some kind of a brace-rod between the side-ladder and the surface of the box-car, and has provided for the clearance of the side ladders with reference thereto. The Interstate Commerce Commission, after a full investigation of the subject, made an order

providing exactly how side ladders must be constructed and ordered the "minimum clearance of treads, two (2) preferably two and one-half (2½) inches." Now what did the Commission mean by "clearance"? Did it mean that the treads of the side-ladder must be two (2), preferably two and one-half (2½) inches from the side of the box-car? If they meant this, they surely would have said it. This order was for the benefit of and directed to the mechanical departments of the railroads. In this order the Commission *was speaking the language of machinists.* They were talking to men who looked at railroading in a practical way, and as machinists.

The mere fact that the employee is injured *while using* the ladder is no proof that the ladder is defective. (*Fryer v. St. Louis-San Francisco Ry. Co.*, 333 Mo. 740, 63 S. W. (2d) 47, at p. 53; *Zachritz v. St. Louis etc. Ry. Co.*, 336 Mo. 801, 81 S. W. (2d) 608.) The plaintiff in the case of *Reeves v. Chicago, St. P. M. & O. Ry. Co.*, 147 Minn. 114, 179 N. W. 689, was injured *while using* the step of an engine cab on account of the presence of a piece of coal, but the Supreme Court of Minnesota held that this did not prove a violation of the Federal Safety Appliance Act. The plaintiff in *Zachritz v. St. Louis-San Francisco Ry. Co., supra,* was injured *while using* the hand rail of the tender, because the hand rail "was as slick as grease," but the Supreme Court of Missouri again held that this was not a violation of the Safety Appliance Act.

In *Ford v. McAdoo etc.*, 231 N. Y. 155, 131 N. E. 874, the plaintiff's decedent was injured *while using* the ladder on the tender, but the Court of Appeals of New York held that the fact that the deceased's clothes got

caught on a hook that was located on the side of the tender and close to the grab handle was no proof of a defective appliance.

The plaintiff in the case of *Buschalewiski v. New York Cent. R. Co.,* 105 Misc. Rep. 541, 173 N. Y. Supp. 506, was injured *while using* automatic couplers, but the New York Court held that the defects complained of related to the condition and fastening of certain timbers which helped to secure the coupler and drawhead to the car, and that, consequently, this did not prove a defective safety appliance.

The plaintiff in *Slater v. Chicago, St. P., M. & O. Ry. Co.,* 146 Minn. 390, 178 N. W. 813, was injured *while using* a running board on the refrigerator car, but the Supreme Court of Minnesota held that the defect was not in the running board itself, but in the cover of the ice bunker which had been displaced so that it protruded upon the running board and that, as a consequence, the plaintiff failed to prove a defective safety appliance.

The plaintiff in *Chicago, R. I. & P. Ry. Co. v. Benson,* 352 Ill. 195, 185 N. E. 244, was injured *while using* a side ladder, the same as in this case, but the Supreme Court of Illinois held that the wire which was attached to the grab iron was no part of the safety appliance.

The plaintiff in *Ford v. N. Y., N. H. & H. Ry. Co.,* 54 Fed. (2d) 342, was injured *while using* the hand holds on the tender, but the Federal Court held that the grease on the hand holds, that caused the plaintiff to fall, was no part of the hand holds and did not constitute a defective safety appliance. The plaintiff in the case of *George v. Atchison Company,* 102 Kans. 774, 178 Pac. 403, was in-

jured *while using* automatic couplers, but the Supreme Court of Kansas held that the fact the cars involved were not equipped with "buffers" to mitigate the shock caused by the cars running together, did not prove a defective safety appliance, a buffer being a separate appliance.

The Supreme Court of California in its holding has made the railway responsible for the presence of this diagonal brace rod *as an absolute liability.* While it is not precisely analogous, the Court in *Ford v. N. Y., N. H. & H. Ry. Co.,* 54 Fed. (2d) 342, in considering a case involving grease on the hand-hold, said: "It was not the intent of Congress to make the railway company responsible for grease on the hand-hold, imposed as an absolute obligation." And, in *Slater v. St. P., M. & O. Ry. Co., supra,* where the plaintiff claimed a defective and insecure running board on a refrigerator car, the Court held that "the law so far as it relates to running boards deals solely with the mechanical construction and maintenance of secure running boards" and the fact that an ice bunker cover had been displaced so that it protruded upon the running board and interfered with its use did not constitute a defective safety appliance.

The mere fact that the respondent was injured while using the side-ladder constitutes no proof that the side-ladder was defective. In *Zachritz v. St. L. & San Francisco Ry., supra,* there was involved a case where the respondent took hold of the hand rail of a tender and attempted to step to the lower step leading to the cab and fell because the hand rail "was slick as grease" and "it

had oil on it." Notwithstanding the fact that the action was based upon the Boiler Inspection Act, which was much broader in its scope than the act in question here, the Court said:

> "In order for an injured party to recover under the Federal Acts, he must introduce substantial evidence of a defect or show that an appliance failed to function and by reason thereof he was injured. * * * The fact that respondent's hand slipped on the hand-hold was not evidence that the hand-hold as such failed to fulfill its proper function."

In *Ford v. McAdoo, etc.* (Court of Appeals of New York), *supra*; the plaintiff was a brakeman on a freight train of defendant. The pertinent facts were as follows:

> "At the left-hand corner of the tender on the outside was an opening leading into the water tank and above this was a hook upon which to hang a pail. A grabhandle was on the tender leading down from the deck of the engine. This hook in question was 23½ inches back from the grabiron on the left-hand side of the fender and 8 inches from the bottom of the tank and tender. * * *
>
> "After the accident there was found on this hook a small piece of blue cloth striped with white similar to the overalls worn by Ford.
>
> "The theory of the plaintiff was that Ford stepped off the engine before he reached the bridge, was caught by this hook, and dragged into the gussets of the bridge and thrown under the wheels of the car. This hook, it is said, was a dangerous contrivance rendering the engine and tender unsafe and improper within the meaning of the Boiler Inspection Act of Congress, as amended."

The Court said:

> "It (the hook) was as much a part of the construction as was the grabhandle or side of the tender. This device had been in use for years without causing any accident. No danger had ever arisen from it. It had served its purpose and caused no harm so far as the evidence in this case shows. * * *
>
> "It may be that opinions vary as to the best method of procuring water from the tank for the purposes needed. Later inventions may make former uses inadequate. When it comes, however, to a question of proper condition and safety under the Boiler Act, that mechanism which has been in constant use for years without causing injury must be considered proper and safe until some notice or occasion indicates its danger and insufficiency."

It should be noted here that Ovid L. Wright, general foreman of the Car Department of the Santa Fe Railway, having general supervision of all car repairs at the Richmond shops, and who examines approximately one thousand cars a month, testified in behalf of the petitioner:

> "I am familiar with the type of car involved in this lawsuit. These cars have been in constant use in California since 1929. * * * I have never heard of an accident attributable to or claimed to be attributable to this brace rod in any way other than the case involved here." [R. p. 94, fols. 268, 270; R. p. 94.]

While we concede that the courts should give a liberal interpretation to the Safety Appliance Acts, yet they must not give an unreasonable interpretation of it.

The case of *United States v. Chicago, S. P. M. & O. R. Co.*, 43 Fed. (2d) 300, was cited by the California Supreme Court in support of its statement that "the Safety Appliance Acts are to be liberally construed for the purpose of relieving trainmen of danger." We think that is correct, but the courts will not give a statute an unreasonable construction under the guise of making it liberal. *Pennell v. Philadelphia & R. R. R. Co.*, 231 U. S. 675, 58 L. Ed. 430, was a case where the plaintiff obtained a judgment against the railroad company on an alleged failure of the company to comply with the requirements of the Safety Appliance Act requiring automatic couplers. While the couplings *between the cars* were automatic and in full compliance with the Act, the coupler *between the engine and tender* was composed of a draw-bar and pin. The pin broke, resulting in the air hose breaking, thereby setting the brakes on the whole train, throwing plaintiff's intestate to the ground, causing his death. The court held that under the Act the word "tender" was not within the definition of the word "car", and reversed the case because the trial court had held, in seeking a "liberal" construction of the statute, that the word "tender" should be synonymous with the word "car".

In *George v. Atchison Company, supra*, the Supreme Court of Kansas was confronted with this sort of a case: Suit was brought against the company alleging a defective safety appliance which, in this case, was alleged to be the automatic coupler. The cars involved, it was alleged, were not equipped with "buffers" which was a contrivance to mitigate the shock caused by cars coming together. The plaintiff was operating the coupling device which device worked properly, but, on account of the fact

that these cars were not equipped with "buffers", the cars came too close together and struck him. The Supreme Court of Kansas said, in deciding the case, "the definitions of 'buffer' indicate a contrivance to mitigate the shock caused by cars coming together, rather than a Safety Appliance." Likewise, we say in the case at bar, paraphrasing the language of the Supreme Court of Kansas, the definitions of "brace-rod" and "anchor-rod" indicate contrivances to strengthen the end of box-cars, rather than a safety appliance.

In *Boehmer v. Pennsylvania R. R. Co.*, 252 U. S. 496, 64 L. Ed. 680, the Court was called upon to decide a case where the plaintiff sought damages against the railroad under the claim that the railroad had been negligent in using a freight car not equipped with hand-holds or grab-irons on *all four of the side corners* of the box-car. The car in question had hand-holds on the diagonally opposite corners. In deciding against the plaintiff the Supreme Court of the United States said "Section 4 must be intepreted and applied in view of practical railroad operations." Thus, we contend, that in the case at bar the Safety Appliance Act relating to side-ladders on freight cars "must be interpreted and applied in view of practical railroad operation." And the uncontradicted evidence in the case is that it has been the custom of all railroads at all times to have some sort of braces on the sides of box-cars between the side-ladder and the side of the car, and this has been acquiesced in by the Interstate Commerce Commission. "The custom of railroads could not, of course, justify a violation of the statute, but that custom, having the acquiescence of the Interstate Commerce Commission, is persuasive of the meaning of the statute."

In *Chesapeake & Ohio R. Co. v. Charlton,* 247 Fed. 34, the plaintiff sought judgment against the railroad under the Employers' Liability Act to recover damages on account of an alleged defective safety appliance which was the automatic coupler. The evidence was that the knuckle was open and that this caused a failure of the couplers to couple automatically. Plaintiff contended that the Safety Appliance Act required the railroad to equip all of its cars with couplers that would automatically couple by impact and that any failure of the cars to couple warranted the court in submitting the question to a jury with the view of having it determined whether such cars had been equipped in compliance with the statute. The court held that while it was the purpose of Congress to require all railroads to furnish an appliance to couple cars together which would couple automatically by impact, Congress did not thereby intend to provide that while the knuckles of a coupler by the motion of the train or otherwise should be closed this of itself would be sufficient to render the railroad liable for a failure to comply with the statute providing the appliance furnished was in perfect working order. Again we see that a "liberal construction" of the statute did not compel the court to make an unreasonable construction of it, but, rather, the court "interpreted and applied it in view of practical railroad operation." Thus we see the "liberal construction" of the statute should not lead to an unreasonable construction of it, and no construction of the statute can be upheld unless it is "interpreted and applied in view of practical railroad operation."

As we have said, the mere fact that the respondent fell while using the ladder fails to prove a defective safety appliance. As was said in *Zachritz v. St. L.-San Francisco Ry. Co., supra,*

> "The operation of a railroad is necessarily attended by some danger. It would be impossible to so equip the engines and cars as to eliminate all danger of employees being hurt. The Safety Appliance and Boiler Inspection Acts do not contemplate this to be done. As long as railroads are operated, employees, will, from time to time, fall from the cars and engines and otherwise be injured. That they do so does not of itself mean that the company has violated the Safety Appliance or Boiler Inspection Acts or that any one has been negligent."

And, in the case of *Fryer v. St. L.-San Francisco Ry. Co., supra,* the Supreme Court of Missouri, said:

> "The mere fact that an injury has resulted from some condition of a locomotive or a part or appurtenence thereof does not itself show that that the engine or its parts are not in proper condition and safe to operate."

To prove a defective Safety Appliance some defect must be shown in the safety appliance itself.

> "It would be manifestly unfair to hold that the carrier had violated the statute until the inefficiency of the device had been disclosed by some reasonable test that would justify the conclusion that it was defective." (*St. Louis Southwestern Ry. Co. v. Bounds,* 244 S. W. 1099.)

IV. The Safety Appliance Is Deemed Proper When It Fully Complies With the Orders and Specifications of the Interstate Commerce Commission.

It is contended that there is no rule of the Interstate Commerce Commission covering the situation here. The Supreme Court of California said,

> "We are of the view that respondent can succeed herein only if the rule as to clearance was not intended to cover the situation covered by the facts herein." (60 Pac. 2d. p. 464, column 2.)

And the court further said,

> "Where the Commission has not made a rule in regard to a particular matter, the test is whether the appliance is safe or secure within the meaning of the statute, and this question is properly submitted to the jury. It should not be held that because the commission has failed to regulate a particular matter, that the carrier is relieved from the liability imposed by statute to supply an appliance which is secure and safe as to that detail." (60 Pac. 2d 465, column 1.)

We contend that the Interstate Commerce Commission has fixed a rule which exactly meets the situation here. The Interstate Commerce Commission, in compliance with section 3 of the Federal Statute, heretofore quoted, held its investigation and, after being fully advised, fixed the standards of construction of side-ladders on freight cars. The Commission's order is printed in full in volume 2 of Roberts' Federal Liability of Carriers, pages 2013 and 2014. The Commission fixed the number, location, dimensions and manner of application of the safety appliances, including the ladders; it designated in detail the minimum length of ladder treads, the maximum spacing between

the ladder treads, the location of the ladder tread with reference to the roof, the spacing of the ladder treads, the maximum distance from bottom tread of side-ladder to top tread of sill step, the location of the end ladders, the minimum dimensions of hardwood treads, the minimum diameter of iron or steel treads; then comes the "minimum clearance of treads two (2), preferably two and one-half (2½) inches." Following this, in the Commission's order, are detailed specifications as to the location of the side-ladders and further detailed specifications as to the manner of application.

It is obvious, therefore, that the Supreme Court of California was mistaken in its contention that no rule or order had been made by the Interstate Commerce Commission governing the situation here.

Furthermore, there is a presumption that the Interstate Commerce Commission approved this type of equipment, and that *clearance* should be interpreted as the railroads have long applied it. In *Fort Worth & D. C. Ry. Co. v. Smithers* (Texas), 272 S. W. 764, the court said:

> "In the absence of evidence to the contrary, it must be presumed that the appellants have provided such equipment as the law required, and that the *Interstate Commerce Commission, in the performance of its duty, had approved the equipment.*" (Italics ours.)

This petitioner is entitled to the legal presumption, therefore, that the Interstate Commerce Commission has acquiesced in the use of the equipment involved. Because we were entitled to this presumption we did not deem it necessary to prove the fact that the Interstate Commerce Commission has never raised a question or an objection to our use of this equipment. We say this not with any

purpose of going outside of the record in this case, because this evidence is actually in the case as a matter of legal presumption.

Not only has the Interstate Commerce Commission acquiesced in our use of this particular equipment, but in similar equipment which has been used ever since freight cars were made. The case of *Pennell v. Philadelphia & R. R. R. Co.*, 231 U. S. 675, 58 L. Ed. 430, cited by the Supreme Court of California in its opinion, held that "custom, having the acquiescence of the Interstate Commerce Commission, is persuasive of the meaning of the statute."

Upon the Interstate Commerce Commission is imposed the duty of executing these statutes. Section 15 of Title 45 U. S. C. A., provides that

> "it shall be the duty of the Interstate Commerce Commission to enforce the provisions of this chapter as to equipment of each car with safety appliances and all powers heretofore granted to said Commission are hereby extended to it for the purpose of such enforcement."

No ladders are safe and secure. Webster defines the word "secure" as "not exposed to danger," and "to relieve from exposure to danger," etc. Anyone familiar with the A, B, C's of railroading knows that this definition of "secure" cannot be literally followed. It is a matter of common knowledge that every person on either the side ladder or the end ladder of a freight car is exposed to dangers—dangers of the most glaring sort. Every man in using a side ladder or end ladder on a freight car may be exposed to a hundred dangers which can only be avoided

by the exercise of due care; in the first place he may be exposed to the danger of falling, which is a danger present in the use of any ladder. Again, he may be exposed to the dangers of impaired clearances and countless numbers of such places exist upon every railroad. Again, he may be exposed to the dangers of other freight cars being shunted or switched. He may be exposed also to the dangers of reckless automobile driving on public crossings and there are numerous cases where brakemen have been injured in this fashion. He may be exposed to danger by the presence of sleet on the ladder. Sleet makes the side-ladder insecure or unsafe for use; yet, we apprehend, it will not be contended that the safety appliance statute is violated if a brakeman slips upon a side-ladder coated with ice during a sleet storm. (*Slater v. Chicago, St. P. M. & O. Ry., supra.*)

The law does not require the employer to furnish the servant with the latest or best equipment or appliances, if it were to be conceded that any other appliance is any better than the brace-rod used in this case.

> "* * * It is a well-established rule that the master is not bound to furnish the latest or best tools or appliances for the use of his servants. That rule is applicable here, and we hold that defendant was not liable for failure to furnish the best mechanical contrivances and inventions or to discard appliances upon discovery of later improvements." (*Baltimore & Ohio Ry. v. Groeger,* 266 U. S. 521, 69 L. Ed. 419.)

The fact that this precise type of brace rod on the car in question is not found on the freight cars of any other railroad is neither surprising nor significant. Engineering opinions differ as to all types of equipment. Seldom

have two railroads exactly the same type of any given equipment. Mechanical engineers, while they may agree upon the needs and the object sought, rarely agree as to methods and means. Our courts recognize this.

In *DeQueen & E. R. Co. v. Dye*, 187 Ark. 219, 58 S. W. (2d) 955, an experienced brakeman was injured while engaged in setting a brake on a box car. He brought suit to recover damages for his injury alleging violation of the Safety Appliance Act in that the defendant failed to equip the car with efficient hand-brakes. In deciding the case the Court used this significant language:

> "These cars and their equipment were manufactured with the Safety Appliance Act (45 U. S. C. A., Sec. 1 *et seq.*) and the rules of the Interstate Commerce Commission in mind, and were built and equipped so as to comply with the same. It is also to be remembered that immediately after the accident in question an examination of the car disclosed no worn or broken parts, no loose connection or other imperfections, and there were no structural defects. The question, therefore, of the efficiency of the equipment is a mechanical one. Since there are a number of mechanical questions arising in the determination of the proper construction of cars and their braking equipment, and as there are various types of brakes, each of which has its particular advocates—some preferring one and some another—and as inventions are frequently occurring and many devices provided to accomplish a like purpose, it is not proper for courts to lay down rules which will operate to restrict carriers in their choice of mechanical means by which their operations may be conducted. Nor should such matters be left to the varying opinions and verdicts of juries."

Some of the most pertinent cases we have found have to do with railroad locomotives. In citing these cases, however, it should be borne in mind that they are all based upon both the Boiler Inspection Act and Safety Appliance Acts. As previously noted, the Boiler Inspection Act is much broader than the Safety Appliance Act involved here. The Boiler Inspection Act provides that

> "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life, or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30, and 32 and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for." (45 U. S. C. A. p. 79, sec. 23.)

In *Auschwitz v. Wabash Railway Co.*, 346 Ill. 190, 178 N. E. 403, the Supreme Court of Illinois had before it for consideration the following facts:

> "The plaintiff charged that the defendant failed to maintain the tender and its parts in proper condition and safe to operate and that the step 'was bent, twisted and out of place and the same then and there improperly extended out beyond the outside of said locomotive and tender.'"

Mr. Justice Dunn, in the opinion, said:

> "The Federal Boiler Inspection Act * * * conferred on the Interstate Commerce Commission power to specify the sort of equipment to be used on locomotives in interstate commerce, * * *.
>
> * * * * * * * *
>
> "The evidence shows, without dispute, that the sill-steps were, as originally constructed, in compliance with the order and specifications of the Interstate Commerce Commission; * * * It is not for the court to lay down rules which will operate to restrict the carriers in their choice of mechanical means by which their locomotives, boilers, engine tenders, and appurtenances are to be kept in proper condition, nor are such matters to be left to the varying and uncertain opinions and verdicts of juries. The interests of the carriers will best be served by having and keeping their locomotive boilers safe, and it may well be left to their officers and engineers to decide the engineering questions involved and the means to be used to that end, subject to the rules and specifications of the Interstate Commerce Commission. When the commission has, by order, prescribed rules and specifications in regard thereto, all that is required of the carrier to fulfill its duty in that respect is a strict compliance therewith."

In *Pursglove v. Monongahela Ry. Co.*, 285 Penna. 27, 131 Atl. 477, the Supreme Court of Pennsylvania was confronted with the following case:

> "Pursglove was employed by the defendant company as a yard brakeman. * * * The switching engine had attached in front a head log, and to it a footboard was held in place by brackets. Two nuts, measuring seven-eighths of an inch each, were used

as fasteners, leaving the thread end of the bolt extending beyond for a short distance, variously estimated at from one-half to two inches. Pursglove was standing on the right side, and stepped from the moving engine when it came opposite the office of the company, intending to secure a drink of water there, and then pass across to the train which was to be transferred. In descending from the footboard, his raincoat caught on the end of the protruding bolt, resulting in a fall."

In deciding the case the Court said:

"It may be noticed that the rules promulgated by the Interstate Commerce Commission, pursuant to the authority granted by the Safety Appliance Act, as amended (U. S. Comp. St., Secs. 8605-8623), directed, in the cases where the location of bolts was deemed necessary of regulation, that nuts attached to bolts shall be on the outside, evidently to provide for easier and more thorough inspection. Where locomotives are used in switching service, as here, it is expressly required that footboards shall be securely bolted to metal brackets, each of which shall be fastened to 'buffer-beam, end-sill or tank-frame by not less than two seven-eighths inch bolts' (2 Roberts, Federal Liability of Carriers, 1625), and the compliance with this duty imposed cannot be said to constitute negligence. * * * In the present case, there was no lack of compliance with a stautory duty, and recovery could be had only if negligence had been established, and it further appeared that the risk was not an ordinary one assumed by the plaintiff."

In *Fredericks v. Erie R. Co.*, 36 Fed. (2d) 716, the Circuit Court of Appeals. Second Circuit, of the state of New York, considered a suit brought for an injury to an employee while endeavoring to operate an appliance called a "petcock." After having passed on several questions, the Court said:

> "The plaintiff also claimed that the engine was defective because of the unsafe location of the drain cock, and the defendant requested the court to charge 'that the jury cannot find the engine defective on account of the location of the frost cock.' Instead of complying with this request, the court left the question of safe location to the jury, with some general remarks to the effect that it should not consider purely mechanical arrangement, but should determine whether the appliance was safe to operate, and proper and safe for the service in which it was to be used. When, as in this case, the evidence was overwhelming that the drain cock was located in the only place that it could be put and work properly, and that such location was of necessity uniformly used on lifting injectors by railroads in the territory where the plaintiff was hurt, it was error to permit the jury to call into play its own ideas as to a safe and proper location, and allow it to find the engine defective because the drain cock was not placed, perhaps, where the jury thought it should have been put."

The above analysis is taken from *De Queen & E. R. Co. v. Dye, supra.*

The Supreme Court of California sustained the trial court in submitting to the jury the question whether the side-ladder of the freight car was "secure", when the claim of insecurity rested wholly upon the presence of the brace

rod. The trial court gave about a dozen separate instructins on this point. [R. pp. 72, 104, 105, 154, 155, 170, 171, 199-202, 210-212, 223, 238, 240, 241, 242, 244, 245.] We claim that these instructions were all in conflict with the principle set forth in the *Fredericks* case, *supra*. And with *Lehigh & N. E. R. Co. v. Smale,* 19 Fed. (2d) 67. Here the Circuit Court of Appeals, Third Circuit, decided a case involving these facts:

> "While the train was in motion, Smale, who was head brakeman, having in view aiding in a train movement in the line of his duty, went to the front of the engine in question and descended on steps fastened to the crossbeam at the front of the engine. In order to do so safely, it is obvious that he required support of handholds, and the requirements of the Interstate Commerce Commission in that regard are quoted in the margin.
>
> "In compliance with its statutory duty, the railroad placed a wrought iron hand-hold of the proper thickness securely bolted with a cross-beam; but it was alleged, and around this the controversy centers, that such handhold did not have the clear minimum clearance length of the 14 inches required, in that at its top there was placed a flag-holding device, which presented a split at its outer end. When Smale, in endeavoring to make the descent, reached for this handhold, he placed his hand on the top of the handhold and over this flag-holding device, and his glove caught in the split. When he let loose the detention of the glove pulled him around, and he fell, and his leg was run over."

The case was submitted to a jury on the controverted fact as to whether the hand-hold had the clear minimum clearance required, and the United States District Court submitted the case to the jury in these words:

> "It was a combination handhold and flagstaff. There is testimony that it was equipment used on the New Jersey Central Railroad, Lackawanna & Western Railroad, as well as on the Lehigh & New England Railroad, the defendant in this suit. *If the grabiron complied with the regulations of the Interstate Commerce Commission, that is the end of your deliberations, and you would find a verdict for the defendant.*" (Italics ours.)

The case of *Napier v. Atlantic Coast Line R. Co.*, 272 U. S. 605, 71 L. Ed. 432, was decided in 1926. Mr. Justice Brandeis, writing the opinion, said:

> "The requirements here in question are, in their nature, within the scope of the authority delegated to the commission. An automatic fire door and an effective cab curtain may promote safety. Keeping firemen and engineers in good health, like preventing excessive fatigue through limiting the hours of service, clearly does so, although indirectly; and it may be found that to promote their comfort would likewise promote safety. It is argued that the authority delegated to the commission does not extend to ordering the use or installation of equipment of any kind; Baltimore & O. R. Co. v. Groeger, 266 U. S. 521, 69 L. Ed. 419, 45 Sup. Ct. Rep. 169; and that Congress has definitely reserved that power to itself, Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co., 167 U. S. 479, 42 L. Ed. 243, 17 Sup. Ct. Rep. 896; Atlantic Coast Line R. Co. v. Georgia, *supra;* United States v. Pennsylvania R.

Co., 242 U. S. 208, 61 L. Ed. 251, 37 Sup. Ct. Rep. 95. The question whether the Boiler Inspection Act confers upon the Interstate Commerce Commission power to specify the sort of equipment to be used on locomotives was left open in Vandalia R. Co. v. Public Serv. Commission, 242 U. S. 255, 61 L. Ed. 276, P. U. R. 1917B, 1004, 37 Sup. Ct. Rep. 93. We think that power was conferred. *The duty of the commission is not merely to inspect. It is, also, to prescribe the rules and regulations by which fitness for service shall be determined. Unless these rules and regulations are complied with, the engine is not 'in proper condition' for operation. Thus the commission sets the standard. By setting the standard it imposes requirements.* (Italics ours.) The power to require specific devices was exercised before the Amendment of 1915, and has been extensively exercised since."

The case of *Baltimore & Ohio Ry. v. Groeger,* 266 U. S. 521, 69 L. Ed. 419, was decided in 1925. Mr. Justice Butler delivered the opinion of the court. In this case respondent's deceased husband, a locomotive engineer, was killed by an explosion of the boiler. We quote from the opinion:

"The jury was by the charge authorized to find that the act required defendant to have a fusible plug in the crown sheet of the boiler. There is nothing in the act or in any rule, regulation, or order authorized by it, which specifies the use of fusible plugs. This, however, does not relieve the defendant of the duty to have and keep its boilers safe for use, as required by the act. * * * It appears that among practical men experienced in such mat-

ters, there is a difference of opinion as to the usefulness of such plugs. If the question whether the standard of duty fixed by the act required defendant to have a fusible plug in the crown sheet of the boiler were one for the determination of a jury, we think there was evidence which would sustain a verdict in the affirmative or in the negative. But we think the question was not for the jury. * * * The act required a condition which would permit use of the locomotive without unnecessary danger. It left to the carrier the choice of means to be employed to effect that result. While the burden was on the plaintiff to prove a violation of the act by defendant, she was not bound to show that any particular contrivance or invention was suitable or necessary to have and keep the boiler in proper condition. There is a multitude of mechanical questions involved in determining the proper construction, maintenance, and use of the boilers, other parts of locomotives, their tenders and appurtenances, all of which are covered by the Boiler Inspection Act, as amended. Inventions are occurring frequently, and there are many devices to accomplish the same purpose. Comparative merits as to safety or utility are most difficult to determine. It is not for the courts to lay down rules which will operate to restrict the carriers in their choice of mechanical means by which their locomotives, boilers, engine tenders, and appurtenances are to be kept in proper condition. Nor are such matters to be left to the varying and uncertain opinions and verdicts of juries. The interests of the carriers will best be served by having and keeping their locomotive boilers safe; and it may well be left to their officers and engineers to decide the engineering questions involved in determining whether to use fusible plugs or other means to that end."

In *Lancaster & Wright v. Allen* (110 Tex. 213, 217 S. W 1032), the facts were as follows:

> "Defendant in error alleged, and offered evidence to establish, that T. O. Allen's death resulted from defects due to the receivers' negligence, in a switch point on the receivers' track, and in a flange on a locomotive wheel, which caused the derailment of the locomotive on which T. O. Allen was discharging his duties to the receivers as fireman.
>
> "The defect in the flange of the locomotive wheel on which defendant in error relied in her pleading and proof was that it had become so worn as to cause the locomotive wheel and truck to climb the rail and derail the locomotive.
>
> "Plaintiffs in error duly answered, and introduced evidence to show that the switch point was not defective, and to show that the flange of the locomotive wheel was not worn to the extent required in order to be defective under the Safety Act of Congress and the rules prescribed thereunder by the Interstate Commerce Commission."

At the close of the evidence the trial court refused a special charge requested by plaintiffs in error as follows:

> "It appears in this case that Allen at the time he was killed was engaged in interstate commerce, and the rights of the plaintiffs are therefore governed by the act of Congress. It appears in the evidence that the Interstate Commerce Commission, acting by virtue of the power granted them by the act of Congress, had made certain rules governing what condition of flanges of a locomotive wheel makes it safe and what condition makes it unsafe. If you believe in this case that the flanges on the wheel were

in accordance with said rules enacted by the Interstate Commerce Commission, then you cannot find that the railroad was negligent in that regard."

In deciding the case the Court said:

"In our opinion, the proper test was stated in the refused charge. * * *

"The Interstate Commerce Commission approved rules and regulations prescribing with particularity the extent of wear on the flange of a locomotive wheel which renders it defective and which requires its discontinuance from service. * * *

The amended act made it obligatory on the receivers to conform to the rules and regulations of the Interstate Commerce Commission governing worn flanges on locomotive wheels."

In *Mahutga v. Minneapolis, St. Paul etc. Ry. Co.,* 182 Minn. 362, 234 N. W. 474, a question arose as to whether the railroad was using proper cab curtains on a locomotive. These cab curtains had been standardized by the Interstate Commerce Commission.

The Court held that where cab curtains were used in accordance with the standards authorized by the Interstate Commerce Commission it did not constitute negligence on the part of the railroad when it failed to have a "tie-back appliance" for the curtains. In deciding the case the Court said:

"Our construction of the decision and order of the commission is that it intended to and did standardize the Wisconsin side curtain, here used, as suitable for all the purposes of the law, and it follows that a compliance therewith makes the locomotive 'safe to operate without unnecessary peril to life or limb.'

> The decision of this ultimate fact rests solely with the commission. A jury cannot be permitted to substitute its judgment in lieu of the judgment of the commission upon whom the law places the responsibility for such determination."

The Safety Appliance Act involved must be interpreted in the light of practical railroad operation. The courts, *in applying the law to the other Saftey Appliance Acts,* have construed them in the light of practical railroad operation.

In the case of *Bochmer v. Penna. Ry. Co., supra,* the Court said, "Section 4" (which is the section of the Safety Appliance Act involved here) "must be interpreted and applied in view of practical railroad operations."

In the case of *Fort Worth & D. C. Ry. Co. v. Smithers, supra,* there was a suit instituted under the Federal Employers' Liability Act and the Safety Appliance Act, alleging that the plaintiff, a hostler-helper, was injured as the result of the failure of the ash pan to close without the necessity of plaintiff going under the engine, in violation of the safety appliance law, to-wit, the Federal Ash Pan Law. This law was as follows:

> "It shall be unlawful for any common carrier engaged in interstate or foreign commerce by railroad to use any locomotive in moving interstate or foreign traffic, not equipped with an ash pan, which can be dumped or emptied and cleaned without the necessity of any employee going under such locomotive." (U. S. Stat. at Large, Vol. 35, p. 476, c. 225; U. S. Comp. Stats., Secs. 4624-4629.)

The plaintiff contended that in assuming a position upon the ground which would enable him to so close it he would be partly under the engine. The photographs which are

made exhibits to and part of the statement of facts show an employee operating the equipment while standing something over 2 feet from the rails, although about 18 inches above his head and extending out 5 or 6 inches over that side of his person next to the engine is seen what we take to be an extension of the floor of the cab or outer edge of the running board of the engine. The Court said:

> "It cannot be held, when the law is reasonably construed, that such employee is in any sense required to 'go under' the engine. . . . The evil which the law was intended to remedy was to require such a contrivance as would enable employees to open and close the ash pan without getting under the engine; that is, in such position between the rails or so close to the wheels or other parts of the engine that an unexpected movement would result in injury. . . ."

The New York court, in deciding a case involving automatic couplers, took the view that the case should be decided in the light of practical railroading. This was the case of *Buschalewiski v. New York Central R. Co., supra.* In this case the trouble with the freight car, for which it had been ordered to the repair shop by the inspector, was that a certain timber underneath the car, which was bolted to the frame of the car, had in some manner been split, and one or more of the bolts fastening to the framework of the car were missing and, when the car came in contact with the car ahead, owing to its weakened condition, gave way. It is to be noted that nothing was in fact wrong with this coupler proper. The defects related to the condition and fastening of certain timbers underneath the car, which helped to secure the coupler and drawhead to the car. The argument of counsel was that the coupler appliances were

defective and insecure, within the meaning of this act, even though the automatic coupling features were present. The Court said:

> "The statute should receive a fair interpretation to carry out its purposes; but, as was said in St. Louis & Iron Mountain Ry. v. Taylor, 210 U. S. 295, 28 Sup. Ct. 621, 52 L. Ed. 1061:
>
> " 'Certainly the statute ought not to be given an absurd or utterly unreasonable interpretation leading to hardship and injustice, if any other interpretation is reasonably possible.' "

The case of *Baker v. Grace* (Court of Civil Appeals of Texas), 213 S. W. 299, held upon the authority of *United States v. Erie R. Co.*, 237 U. S. 402, 59 L. Ed. 1019, and *United States v. C. B. & Q. R. Co.*, 237 U. S. 410, 59 L. Ed. 1023, that an engine and two wrecking cars did not constitute a train within the Act of Congress, so as to make the railroad guilty of a violation of the law in failing to have the air-brakes on the cars coupled with the engine. A train, in practical railroad operations, has a definite meaning. To an ordinary layman an engine and two wrecking cars in a switching movement would look like a train. However, in practical railroad operation it is not a train and was so held by the courts.

The case of *United States v. Chicago, St. P. M. & O. Ry. Co.* (Circuit Court of Appeals, Eighth Circuit), *supra*, was an action brought to recover a penalty prescribed by the Safety Appliance Acts as extended by the Interstate Commerce Commission order of June 6, 1910. In this case the railroad was charged with a failure to equip its cars with proper air-brakes in that a passenger engine and tender, coupled to the rear of the train to assist

the head engine in pulling the train up-grade, was not equipped to comply with the federal statute. The Court said:

> "The pusher engine in the instant case was a part of the motive power of the train. Neither the wording nor the intent of the air-brake provisions of the Safety Appliance Act requires that an engine so used be included within the the designation 'cars.' This view is strengthened by the fact that the method of operation here assailed does not present any evil which the power brake provisions of the Safety Appliance Act was designed to remedy. It is significant, too, that this practice has been going on openly and unchallenged for many years, and when the government was operating this railroad the same practice prevailed."

Another illustration as to how the courts, in construing the act, attempt to construe it in the light of practical railroad operations, is the case of *Chesapeake & Ohio R. R. Co. v. Arrington,* 126 Va. 194, 101 S. E. 415. This case was reversed because the trial court refused to give the following instruction:

> "The court instructs the jury that side play in a coupler according to a standard in general and accepted use on railroads does not constitute a defect in a coupler, unless the jury further believe from the evidence that in one or both of the couplers involved in this case there was greater side play, or that the coupler or couplers were more out of line than was necessary for the safe operation of engine and car."

This decision was based upon the opinion of Mr. Justice Holmes in *Atlantic City Railroad Co. v. Parker,* 242 U. S. 59, 61 L. Ed. 150, in which Justice Holmes said, "some lateral play must be allowed to draw-heads."

Wherever the courts have been called upon to pass upon the other Safety Appliance Acts, they have taken the view that these statutes should be interpreted in view of practical railroad operation, and have so interpreted them.

In the light of the authorities we have quoted, we ask this Honorable Court to reverse the judgment of the Supreme Court of California.

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